Supreme Court, U.S.
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No. 94-5707

In The
Supreme Court of the United States
October Term, 1994

Supreme Court, U.S.
FILED
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SHARLENE WILSON,
Petitioner,

v.

STATE OF ARKANSAS,
Respondent.

ON WRIT OF CERTIORARI
TO THE ARKANSAS SUPREME COURT

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PETITIONER'S BRIEF

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January 1995

BEST AVAILABLE COPY

QUESTION PRESENTED FOR REVIEW

Whether the "knock and announce" rule of the common law is constitutionally mandated under the Fourth Amendment.

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The common law knock-and-announce rule is so fundamental to our constitutional system that it must be considered a part of the reasonableness clause of the Fourth Amendment. Therefore, the Fourth Amendment requires that law enforcement officers executing arrest or search and seizure warrants knock-and-announce before entry, unless entry is otherwise excused by exigent circumstances. 31

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CITATIONS OF OPINIONS BELOW

The opinion of the Arkansas Supreme Court is reported at *Wilson v. State*, 317 Ark. 548, 878 S.W.2d 755 (1994).

BASIS FOR JURISDICTION

The jurisdiction of the Court lies under 28 U.S.C. § 1257. The judgment of the Arkansas Supreme Court was entered July 11, 1994. The petition was filed July 28, 1994.

CONSTITUTIONAL PROVISION INVOLVED

The Fourth Amendment to the Constitution of the United States provides as follows:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATUTES INVOLVED

Ark.R.Crim.P. 13.3(e) provides as follows:

> The executing officer, and other officers accompanying and assisting him, may use such degree of force, short of deadly force, against persons, or to effect entry or to open containers as is reasonably necessary for the successful execution of the search warrant with all practicable safety.

STATEMENT OF THE CASE

I. INTRODUCTION

This is a drug case that began with the police targeting petitioner and her soon-to-be husband, Bryson Jacobs,[1] with

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[1] Petitioner and Jacobs were married in jail during Jacobs' trial

an informant. The police made repeated entreaties through a friend of petitioner to sell her drugs. These efforts were first rebuffed, but petitioner and Jacobs ultimately succumbed and engaged in two controlled buys with the informant. The investigation culminated with the execution of a search warrant without announcement, the issue that brought the case to this Court.

II. Facts

A. Overview

Sharlene Wilson, the petitioner, had herself been an informant who did some controlled drug buys for the Drug Enforcement Administration northeast of the Little Rock area. J.A. 55. The police had learned of and then observed some suspicious comings-and-goings from petitioner's and Jacobs' house in Malvern, Arkansas. The police used an informant who was a friend of petitioner[2] to try to make controlled buys of marijuana and methamphetamine from her and Jacobs. After multiple unsuccessful attempts (R. 356), the informant finally was able to make three alleged buys from petitioner and Jacobs on November 22d and 23d and December 30th, 1992. (We say "alleged" because petitioner was convicted by the jury of the first two buys but acquitted of the latter.)

On December 31, 1992, the police executed a search warrant at the Jacobs-Wilson house, and the officers peaceably entered without prior announcement of their identity and purpose; they had no weapons drawn, there was no confrontation, and it was a simple arrest. Present at the time of the search were petitioner, Jacobs, and two visitors, the Coth-

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on July 13, 1993. J.A. 56.

[2] Potts admitted only to being petitioner's acquaintance. However, one of the tape recordings she made has petitioner referring to herself as "your friend and counselor" (R.353) because she and petitioner were once at a battered woman's shelter.

erns. The search warrant was for drugs and a small caliber semiautomatic handgun. In the ensuing search, officers found such a gun, a small quantity of marijuana, a small quantity of methamphetamine from a woman's purse, and some drug paraphernalia. Petitioner and Jacobs were arrested. The Cotherns were released.

They were separately tried. Jacobs was tried July 13-14, 1993, and he was convicted on all counts and sentenced by a jury to a total of 116 years imprisonment and $120,000 in fines. His conviction was affirmed on July 5, 1994. *Jacobs v. State*, 317 Ark. 454, 878 S.W.2d 734 (1994).

Petitioner was tried on November 1 & 4, 1993. Her defense to the controlled buys was entrapment. Ark. Code Ann. § 5-2-209 (1987). She also moved to dismiss the charges against her because the police, when they knew she was represented by counsel, sent a wired informant into her jail cell to engage her in an incriminating conversation. She also moved to suppress the result of the search of her house on four grounds, but she waived two after the proof was in. The remaining grounds were: (1) an alleged *Franks v. Delaware*, 438 U.S. 154 (1978), violation in the affidavit for the warrant, and (2) the failure of the officers to knock-and-announce their identity and purpose before the search. The motions were denied, and she went to trial.

The jury rejected the entrapment defense and convicted her of the two controlled buy counts where the informant was corroborated by the officer listening on a body mike. The jury acquitted her, however, of the uncorroborated controlled buy. As for the product of the search, she was convicted of felony possession of drug paraphernalia but only of misdemeanor possession of marijuana, the jury reducing the charge, and she was acquitted of possession of methamphetamine with intent to deliver the drugs allegedly found in her purse. She was sentenced by the jury to a total of 31 years imprisonment and fined $11,000.

Her conviction was affirmed on appeal by the Arkansas Supreme Court on July 11, 1994. *Wilson v. State*, 317 Ark. 548, 878 S.W.2d 755 (1994).

B. Facts and probable cause leading up to the obtaining the search warrant

The facts, stated in the light most favorable to the prosecution, are as follows:

In 1992, petitioner, Sharlene Wilson, lived at 534 Oaklawn Street in Malvern, Arkansas with her boyfriend and soon-to-be husband Bryson Jacobs. The Arkansas Seventh Judicial District Drug Task Force[3] (DTF) was working an informant, Joann Potts, who had been arrested (but not charged) along with her husband for selling drugs, and the Potts' truck had been seized for forfeiture. J.A. 33-35. She was working their way out of that predicament by acting as an informant, and she was even paid for her services. J.A. 35.[4]

The DTF had information of suspicious comings-and-goings at the house for months, and they had surveilled the house for awhile. Thus, the occupants of the house were targeted for investigation. J.A. 36.

Det. Henry Efird testified at the suppression hearing that Potts was sent into the Jacobs-Wilson house several times to attempt to make buys, sometimes while she was working for other officers, but she admittedly failed to make any buys. R. 356. Petitioner was not always there on the when she went in. J.A. 36-37.

1. *November 22, 1992 charge*. The affidavit for the arrest warrant, however, only refers to Potts first having been in contact with Jacobs on November 22, 1992 about her purchasing some marijuana from him. Nevertheless, on that occasion, Potts was searched, equipped with a body mike transmitter, given $120 for the buy, and then sent into the house. Efird listened to and recorded the conversations and transaction. He heard Potts buy one-half ounce of marijuana from Jacobs for $70, and he heard Jacobs making her change. Potts left the house and met with the officer where she handed him the drugs and the $50 remaining. J.A. 7.[5] This became count 1 of CR93-1-1. J.A. 5-6.

2. *November 23, 1992 charge*. The next day, she was again wired and sent into the house to make another controlled buy; this time of methamphetamine. And again, Potts went in while Efird remained in a car listening to and recording the conversations. He could hear Jacobs and petitioner talking, and he could hear Jacobs talking to Potts about the quality of the methamphetamine. Jacobs sold the informant four packets for $100, which she turned over to Efird. J.A. 8. This became count 2 of CR93-1-1. J.A. 6.

3. *December 30, 1992 charge*. According to the affidavits for the arrest warrant and the search warrant (J.A. 15-16 & 50-51 (DX 2), respectively), the next apparent contact between Potts and Jacobs and Wilson occurred on December 30, 1992 where Potts called the house and talked to Jacobs. She asked if they had any drugs to sell, and Jacobs said that they did. She was told to call back in about ten minutes when petitioner would be back. J.A. 15, 50.

Potts called back 25 minutes later and petitioner answered. Potts asked if petitioner had any marijuana to sell, and petitioner said that she did. Petitioner told Potts to meet her in five minutes at a convenience store in Malvern. Potts was

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[3] The Seventh Judicial District is comprised of Saline, Grant, and Hot Spring Counties. Malvern is the county seat of Hot Spring County, and it is 45 miles southwest of Little Rock.

[4] She was paid for drug buys from twelve to fifteen persons (J.A. 43), and she made six cases. R. 348. Ultimately, her husband "took [her] charges" and she was not convicted of anything. R. 361.

[5] At the trial, Potts admitted taking her infant daughter along on some of her drug deals in this case and others, as well as those prior to her becoming an informant. R. 349.

then searched by Efird and given $40 in buy money. Efird set up surveillance at the store to await their arrival. This time the informant was not wired nor was her vehicle searched. J.A. 15, 50.

Shortly thereafter, petitioner arrived in her pickup truck, and the informant got in. The informant later told Efird that petitioner asked her if she was working for the police. Potts said she denied it, and petitioner allegedly threatened her if she was. She said petitioner also made her lift her shirt to look for surveillance equipment. Potts then allegedly gave petitioner $40 for a quarter ounce of marijuana priced at $35. Petitioner did not have the $5 change, so they drove together to yet another store to get change. *Id.* En route, petitioner allegedly showed Potts a small chrome plated semi-automatic pistol and threatened her if she was working for the police. J.A. 16, 50.[6] When they returned to the first store, Potts got into her vehicle, and they both drove off. Potts met Efird and gave him the marijuana and the $5 change. *Id.*

The drug charge became count 1 and the "terroristic" use of the weapon became count 2 of CR93-68-1.

C. Issuance of the arrest and search warrants

On December 31, 1992, DTF officers had prepared several arrest warrants and search warrants to be executed that day for various persons, including petitioner and Jacobs. Circuit Judge John W. Cole issued arrest warrants for Jacobs and petitioner in CR93-1-1 (filed December 31, 1992) for delivery of marijuana and methamphetamine. Judge Cole also issued the search warrant for their house based on the events related by the informant allegedly occurring the day before. J.A. 46-48. The search warrant was prepared from a form on a computer, and there were items on the warrant to be checked by the judge, which he did.

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[6] *But see* R. 355 where she equivocates on the supposed threat.

The search warrant provides, in part, as follows:

> Description of person, place or thing to be searched: A white framed house located at 534 Oaklawn Street in Malvern, Hot Spring County, Arkansas.
>
> Scope of the search granted: Includes the premises, curtilage and vehicles of 534 Oaklawn Street in Malvern, AR.

J.A. 46. Specifically, the warrant authorized a search for "illegal narcotics . . . and a small caliber pearl handled weapon . . . ." *Id.* In addition, the judge specifically found there were no exigent circumstances: no probable cause for a nighttime search, no risk of destruction of evidence, and no risk to the officers in the search:

> This warrant shall be executed within 60 days of the date issued and returned to the issuing Judicial Officer within 5 days of its execution unless shorter period(s) of time indicated:
> (✓) Executed within 3 days of date issued (not more than 60)
> (✓) Return within 5 days of date executed (not more than 5)
> (Choose One)
> (✓) This warrant shall be executed between the hours of 6:00 a.m. and 8:00 p.m.
> or
> ( ) I find reasonable cause to believe that:
> ( ) the place to be searched is difficult of speedy access.
> ( ) the objects to be seized are in danger of imminent removal.
> ( ) the warrant can only be safely or successfully executed at nighttime or under circumstances the occurrence of which is difficult to predict with accuracy and authorize the execution of this warrant at any time, day or night . . . .

J.A. 47-48. Indeed, the issuing magistrate could not have issued a nighttime warrant under Arkansas law because there

was no showing of need for one in the affidavit for the search warrant. Ark.R.Crim.P. 13.2(c) (1993).[7]

D. Execution of the arrest and search warrants

About 5 p.m., December 31, 1992, the DTF officers and a uniformed officer, with the Prosecuting Attorney in tow, arrived to serve the warrants. Det. Roger Walls held the search warrant, and he was one of the first two officers in:

> Q Do you know if the door was locked?
> A No.
> Q Myself and Deputy Smith went up on the porch. I had the warrant. He was the uniformed officer. The prime door was open, the screen door was shut. We could see people in the living room. We identified ourselves as police officers and told them we had a search warrant and entered while we were doing that.
> Q People just sitting around on the couch?
> A There was, as we come upon the porch, Mr. Jacobs was standing in the middle of the living room floor facing away from us and he's the person that—
> * * *
> A And we entered the house upon announcement.

J.A. 41-42.

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[7] The rule against nighttime searches is so important in Arkansas, that many cases have suppressed nighttime searches as a result of the requesting officers' failure to specify probable cause for them or because the magistrate merely checked a clause permitting nighttime searches on a form without any proper showing having been made for one. *See, e.g., Hall v. State,* 302 Ark. 341, 789 S.W.2d 456 (1990); *Garner v. State,* 307 Ark. 353, 820 S.W.2d 446 (1991). The nighttime search rule so vital to Arkansas jurisprudence that the good faith exception does not apply to clear violations of the rule; *Richardson v. State,* 314 Ark. 512, 519, 863 S.W.2d 572, 576 (1993); and most violations have been found to be clear because the law is so well settled in Arkansas.

The search produced a small caliber handgun similar to the one petitioner allegedly used to threaten the informant on December 30, 1992, some ammunition, a 16 gauge shotgun, some suspected marijuana and methamphetamine, alleged records of drug transactions, and some drug paraphernalia.

Petitioner and her husband were arrested. The other couple in the house, the Cotherns, were released.

E. The motion to suppress and the hearing

Petitioner filed her motion to suppress on July 22, 1993. It was heard the first day of trial, a Friday. When the issue was to be heard, however, the motion inexplicably was not in the clerk's file (J.A. 29), but it was listed on the docket sheet. J.A. 1, 4. Also, defense counsel did not have a copy of it in hand on the first day of trial, so counsel argued the issues from memory. J.A. 29-31. (Counsel's copy of the motion was presented to the court when the trial resumed on Monday, and then included in the file.) The issues were tried to conclusion, and the trial court ruled that the search was valid without making specific findings, stating only that the "[m]otion to suppress is denied." J.A. 45.

Ironically, the written motion to suppress did not include the knock-and-announce issue. J.A. 17-18. However, the issue was orally presented to the trial court, the court and the parties considered the issue properly before the court, it was fully litigated by agreement and without objection, and the trial court ruled on it. Finally, the Arkansas Supreme Court addressed this issue on the merits, never questioning whether the issue was properly preserved for appeal. J.A. 77; *Wilson v. State,* 317 Ark. 548, 554, 878 S.W.2d 755, 758 (1994).[8]

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[8] At no time has the respondent nor the courts below ever questioned whether this issue was properly before the courts. Petitioner mentions this situation just in case somebody raises the question that the question presented is not properly before the court, because it is. *See, e.g., Steagald v. United States,* 451 U.S. 204, 208-11 (1981)

III. THE CHARGES FILED AGAINST PETITIONER AND JACOBS AND THEIR DISPOSITION

Petitioner and Jacobs were charged together in three separate case numbers. They were tried separately.

A. *CR93-1-1:* The charges in the arrest warrant became case number CR93-1-1, as follows:

Count 1: Both defendants delivered marijuana to an informant for $70 on November 22, 1992, a class C felony.[9] J.A. 5. Both were convicted of this count. Petitioner was sentenced to six years by the jury. J.A. 19. Jacobs was sentenced to 10 years and fined $25,000.

Count 2: Both defendants delivered methamphetamine to an informant for $100 on November 23, 1992, a class Y felony.[10] J.A. 6. Both were convicted of this count; petitioner receiving 25 years from the jury (J.A. 20) and Jacobs 40 years and fined $25,000.

Jacobs was charged as an habitual offender with "more than one but less than four" prior felony convictions.[11] By amendment to the information, petitioner was similarly

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(government could not acquiesce in defendant's standing to challenge a search throughout the litigation and then assert in this Court for the first time that the defendant lacked standing).

[9] Because of petitioner's prior convictions, a class C felony was punishable by 6-20 years imprisonment and/or a fine. Ark. Code Ann. § 5-4-501(a)(4) (1987). (This was amended in 1993 to lower the minimum by half. *Id.* § 5-4-501(a)(4) (Supp.1993).)

[10] Because of petitioner's prior convictions, the range of punishment for a class Y felony of delivery of a schedule I drug as 20-60 years or life imprisonment. Ark. Code Ann. § 5-4-501(a)(1) (1987). (This was amended in 1993 to lower the minimum by half. *Id.* § 5-4-501(a)(1) (Supp. 1993).)

[11] Arkansas law recognizes two levels of habitual offender status: "more than one but less than four" and "four or more" priors. Ark. Code Ann. § 5-4-501 (1987 & Supp.1993).

charged with having "less than four" prior convictions for hot checks and forgery. J.A. 9.

B. *CR93-63-1:* The search of the house produced three counts against both petitioner and Jacobs and a fourth against Jacobs. The counts of the information are listed at J.A. 11:

Count 1: Both defendants possessed methamphetamine and hydromorphone with intent to deliver as a result of the search of the *woman's purse.* This is also a class Y felony. Petitioner was acquitted of this count; J.A. 21; but Jacobs was convicted and sentenced to 40 years and fined $25,000.

Count 2: Both defendants possessed marijuana with intent to deliver, a class C felony. Petitioner was convicted of this count, but the jury reduced it to only misdemeanor possession because of the state's apparent failure to prove intent to deliver of the small amount of marijuana found in the house. She was sentenced to one year in the County Jail and a $1,000 fine.[12] J.A. 21. Jacobs, however, was convicted of the felony and sentenced to 10 years and fined $10,000.

Count 3: Both defendants possessed drug paraphernalia, a class C felony. Both were convicted. Petitioner only received a $10,000 fine. J.A. 22. Jacobs was sentenced to 10 years and fined $10,000.

Count 4: Jacobs was a felon in possession of a firearm, a class D felony, and he was convicted and sentenced to 6 years and a $10,000 fine.

Thus, the search and seizure before the Court only involves petitioner's conviction on the drug paraphernalia charge and the misdemeanor marijuana conviction.[13]

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[12] Under Arkansas law, the jail time for the misdemeanor conviction merges into the felony time; Ark. Code Ann. § 5-4-403(c)(1) (1987 & Repl.1993); but the fine does not.

[13] Jacobs did not raise the knock-and-announce issue in his case, and he received 66 years imprisonment and $70,000 in fines as a result of convictions from the search of his house.

C. *CR93-68-1:* The controlled marijuana buy of December 30, 1992 produced two counts against petitioner:

Count 1: Delivery of marijuana to the informant, a class C felony. J.A. 13-14. Petitioner was acquitted on this count. J.A. 23.

Count 2: Terroristic threatening, a class D felony, for allegedly threatening the informant. J.A. 14. (This count disappeared without any trial.)

IV. THE APPEAL TO THE ARKANSAS SUPREME COURT

The Arkansas Supreme Court affirmed petitioner's appeal on July 11, 1994. *Wilson v. State,* 317 Ark. 548, 878 S.W.2d 755 (1994). She raised three issues: (1) police misconduct of sending a wired informant into her jail cell to get petitioner to incriminate herself at a time when petitioner was represented by counsel and awaiting trial in Circuit Court warranted dismissal of charges, notwithstanding a lack of prejudice; (2) a material omission from the affidavit for the search warrant in violation of *Franks v. Delaware, supra;* and (3) the police failure to knock-and-announce their presence prior to entry violated the Fourth Amendment. The first two issues are not involved in the petition for certiorari.

On the knock-and-announce issue, the Arkansas Supreme Court held:

> As an additional ground for suppression of the fruits of the search, Ms. Wilson submits the officers executing the search failed to knock and announce their identity before entering the residence. The testimony indicated that the officers entered the home while they were identifying themselves. Ms. Wilson relies upon *Miller v. United States,* 357 U.S. 301, 78 S.Ct. 1190, 2 L.Ed.2d 1332 (1958), as the sole authority for her argument.[14] The appellant contends, based upon *Miller,* that the Fourth Amendment requires officers to knock and announce prior to entering the residence. However, *Miller* involved a statute, 18 U.S.C. § 3109, which specified that a law enforcement officer, executing a search warrant, may break open a door only if, "after notice of his authority and purpose," he is denied admittance. The Fourth Amendment was not mentioned.
>
> There is no authority for Ms. Wilson's theory that the knock and announce principle is required by the Fourth Amendment. Furthermore, Ark.R.Crim.P. 13.3 outlines the procedure to be followed in the execution of a search warrant, and provides in part:
>
> > (e) The executing officer, and other officers accompanying and assisting him, may use such degree of force, short of deadly force, against persons, or to effect entry or to open containers as is reasonably necessary for the successful execution of the search warrant with all practicable safety.
>
> Rule 13.3 does not contain a "knock and announce" rule. *See also Dodson v. State,* 4 Ark.App. 1, 626 S.W.2d 624 (1982) (Glaze, J., concurring), *cert. denied,* 457 U.S. 1136, 102 S.Ct. 2966, 73 L.E.2d 1355 (1982).

Wilson, 317 Ark. at 554, 878 S.W.2d at 758 (footnote added).

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[14] With all due respect, this is not correct. Petitioner also cited *Ker v. California,* 374 U.S. 23 (1963), and *Sabbath v. United States,* 391 U.S. 585 (1968), in her brief in the Arkansas Supreme Court at 52-53.

SUMMARY OF THE ARGUMENT

The common law knock-and-announce rule is so fundamental to our constitutional system that it must be considered a part of the reasonableness clause of the Fourth Amendment. Therefore, the Fourth Amendment requires that law enforcement officers executing arrest or search and seizure warrants knock-and-announce before entry, unless entry is otherwise excused by exigent circumstances.

I. The adage that "every man's home is his castle" is an elementary part of the common law. Thus, "physical entry of the home is the chief evil of against which the wording of the Fourth Amendment is directed."

The policies of the knock-and-announce rule recognized at common law and today are: (1) protection of fundamental privacy interests in the home by (a) permitting the target of the search to surrender his or her privacy under the processes of the law, and (b) granting the police and householder an opportunity to avoid searches of the wrong place or arrests or searches of otherwise innocent persons; (2) protection against violence by startled householders or nervous police officers waving guns during a volatile situation that invites the use of deadly force; and (3) protection against unnecessary destruction of private property. These policies protect the innocent and guilty alike. The second also protects the safety of police officers.

II. The common law rule of knock-and-announce is usually stated to have arisen from *Semayne's Case* in 1603. Actually, it derives from a 1275 statute which is stated in *Semayne's Case* to be but a codification of the common law.

III. The knock-and-announce requirement existed in at least ten states by the time the Fourth Amendment was adopted. The same Congress that referred the Bill of Rights to the states adopted the Judiciary Act of 1789 which required federal officers to comply with the law of the states in which they were operating. Congress must have known that this meant that federal officers were governed by the notice requirement.

The federal knock-and-announce statute, 18 U.S.C. § 3109, was adopted in 1917, and it is based on a New York statute from 1782. When the Court construed § 3109 in *Miller v. United States* in 1958, it held that the statute was but a codification of the common law rule.

The knock-and-announce requirement is the law in at

least 41 states and all federal jurisdictions either by statute or case law. *See* Appendices A-E.

IV. The common law has long provided significant guidance in determining what the Framers of the Fourth Amendment intended. Based on settled law at the time, the Framers would not have sanctioned this search.

V. The policies of the knock-and-announce rule recognized at common law are still valid today. They are: (A) protection of fundamental privacy interests in the home by (1) permitting the target of the search to surrender his or her privacy under the processes of the law, and (2) granting the police and householder an opportunity to avoid searches of the wrong place or arrests or searches of otherwise innocent persons; (B) protection against violence by startled householders or nervous police officers during a highly charged situation that invites the use of deadly force; and (C) protection against unnecessary destruction of private property.

The second interest is of particular importance. Common law and statute recognize the right of householders to use deadly force against those entering the premises. Innocent citizens and raiding police officers have been seriously injured and killed during unannounced raids.

VI. The three common law exceptions to the knock-and-announce rule will still be recognized if petitioner prevails. In this case, however, the state asserted no exception to the knock-and-announcement, and the search warrant itself and the manner of execution of the warrant show that there was no exigency.

ARGUMENT

THE COMMON LAW KNOCK-AND-ANNOUNCE RULE IS SO FUNDAMENTAL TO OUR CONSTITUTIONAL SYSTEM THAT IT MUST BE CONSIDERED A PART OF THE REASONABLENESS CLAUSE OF THE FOURTH AMENDMENT. THEREFORE, THE

FOURTH AMENDMENT REQUIRES THAT LAW ENFORCEMENT OFFICERS EXECUTING ARREST OR SEARCH AND SEIZURE WARRANTS KNOCK-AND-ANNOUNCE BEFORE ENTRY, UNLESS ENTRY IS OTHERWISE EXCUSED BY EXIGENT CIRCUMSTANCES.

I. INTRODUCTION

One of the hallmarks of our common law form of government is respect for personal privacy. The sanctity of the home in the law has been deeply respected since Roman times.[15] The American colonists went to war against England at least in part because of the abuses heaped upon them by Crown appointed ministers and governors who failed to adequately respect fundamental personal privacy.

The knock-and-announce rule is a part of that fundamental value of personal privacy and freedom from governmental intrusion. Recognition of the knock-and-announce rule arose in England at least as early as 1275, and, at the

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[15] *See* 1 CUDDIHY, *infra,* at xciii-xciv:

> The Romans had similar concerns, as Cicero revealed in 57 B.C. when he spoke of each citizen's home as "sacred . . . hedged about by every kind of sanctity." Under the code of Emperor Justinian of Byzantium (533 A.D.), a freeman could not even be summoned from his house, for that code acknowledged it as "everyone's safest place, his refuge and his shelter."
>
> The British roots of the amendment are especially deep. Britons have proclaimed their houses to be their castles since at least the early fourteenth century. In exonerating a citizen whose neighbors had defended his home against invasion by his enemies, Chief Justice John Fineux of the Court of King's Bench held in 1505 that "the house of a man is for him his castle and his defense." Other judges expressed almost identical comments on three more occasions by 1616.

(footnotes omitted)

time of the adoption of the Bill of Rights, practically all of the new United States had a law requiring notice when law officers sought entry into the home.

Today, the federal government and at least forty-one states require announcement for entries to arrest and search either by statute, common law, or under the reasonableness requirement of the Fourth Amendment. *See* Appendices A-F. The requirement of notice and announcement has always been an integral part of the Anglo-American law of search and seizure. It is too late to contend that it is not a part of Fourth Amendment reasonableness.

A. The sanctity of the home is our most important privacy interest

The ancient maxim that "every man's home is his castle" has always been an elementary part of the common law. As William Pitt so eloquently stated in a Parliamentary debate in England about 1765:

> The poorest man may in his cottage bid defiance to all the forces of the Crown. It may be frail; its roof may shake; the wind may blow through it; the storm may enter; the rain may enter; but the King of England cannot enter—all his force dares not cross the threshold of the ruined tenement!

Pitt was quoted in *Miller v. United States,* 357 U.S. 301, 307 & n. 7 (1957), discussing the policy behind the federal knock-and-announce statute, 18 U.S.C. § 3109.

The entire premise of the Fourth Amendment was to

> protect the individual's privacy in a variety of settings. In none is the zone of privacy more clearly defined than when bounded by the unambiguous physical dimensions of an individual's home—a zone that finds its roots in clear and specifically constitutional terms: "the right of the people to be secure in their . . . houses . . . shall not be violated."

Payton v. New York, 445 U.S. 573, 589 (1980). According-

ly, the Court has said that "physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed." *United States v. United States District Court for the Eastern District of Michigan,* 407 U.S. 297, 313 (1972), quoted in *Welsh v. Wisconsin,* 466 U.S. 740, 748 (1984). "[A]t the very core" of the Fourth Amendment "stands the right of a man to retreat into his own home." *Silverman v. United States,* 365 U.S. 505, 511 (1961). *Accord: Payton, supra,* at 584-85; *Soldal v. Cook County,* 113 S.Ct. 538, 543 (1992).

In addition, "[t]his court has held in the past that a search which is reasonable at its inception may violate the Fourth Amendment by virtue of its intolerable intensity and scope . . . . 'The scope of the search must be strictly tied to and justified by' the circumstances which rendered its initiation permissible." *Terry v. Ohio,* 392 U.S. 1, 17-18, 19 (1968). "The manner in which the [search] . . . [was] conducted is, of course, as vital a part of the inquiry as whether [it was] warranted at all." *Id.* at 28 (bracketed material added). This includes the knock-and-announce requirement.

B. This Court's protection of the privacy of the home

This Court has never taken physical entries into the home lightly, no matter how relatively slight the intrusion may appear on the surface. A few examples are:

1. *Camara v. Municipal Court,* 387 U.S. 523 (1967), holding that municipal code inspectors could not enter premises without a warrant to conduct a health inspection. There was no investigation of crime, yet the right of privacy was paramount to unjustified, unwarranted intrusions. The Court added that the householder had a right to know the purpose of the entry. *Id.* at 532.

2. In *Chimel v. California,* 395 U.S. 752, 763 (1969), the Court held that a search incident of an entire house was not justified under the Fourth Amendment. Similarly, the

Court held in *Mincey v. Arizona,* 437 U.S. 385 (1978), that officers on premises during the investigation of the killing of a police officer during a drug raid could not continue their search without a warrant.[16]

3. The Court long recognized "hot pursuit" as a common law exception to the warrant requirement because a suspect is not able to flee into his home to merely to avoid arrest. *Warden v. Hayden,* 387 U.S. 294 (1967); *United States v. Watson,* 423 U.S. 411 (1975). Time proved, however, that the gravity of the crime had some bearing on this issue. Thus, in *Welsh v. Wisconsin, supra,* the Court denied an officer in "hot pursuit" of a drunk driver the authority to enter the driver's home to arrest him, notwithstanding that the delay in getting an arrest or search warrant would result in the natural metabolic destruction of the evidence of drunk driving that the officer would need to prove the driver guilty.

4. The government in the enforcement of its tax laws has the power to seize real property, but it needs a warrant to enter a home. *G.M. Leasing Corp. v. United States,* 429 U.S. 338, 357-58 (1977).

5. The sanctity of the home is so great that even fire scene searches require a warrant when officers later search for evidence of the cause. *Michigan v. Tyler,* 436 U.S. 499 (1978). There is no assumption that even a suspected arsonist has abandoned a privacy interest in his home which would

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[16] Ironically, *Mincey* apparently arose in a warrantless knock-and-announce situation. One officer went into Mincey's house for a "buy-bust" where an undercover officer making a buy would leave the premises and then return with other officers who would make the arrest. Gunfire erupted when officers tried to force their way back in. A narcotics officer was killed, and Mincey was seriously wounded. Mincey was tried for murder of a law enforcement officer. His defense was that he did not know that he was shooting at an officer. *State v. Mincey,* 115 Ariz. 472, 566 P.2d 273, 278-80 (1977), *rev'd on other grounds,* 437 U.S. 385 (1978).

permit a warrantless entry to search for the cause of the fire. *Id.* at 505. Just as with Pitts' reference to a "ruined tenement," the Court in *Michigan v. Clifford,* 464 U.S. 287, 293 (1984), held that "reasonable expectations of privacy remain in the fire-damaged property."

6. The Court sanctioned the use of beepers to trace the movements of vehicles and things in public places in *United States v. Knotts,* 460 U.S. 276 (1983). The Court held, however, that once the object containing the beeper entered the privacy of the home, the police could no longer monitor it without a warrant because the threshold had been crossed. *United States v. Karo,* 468 U.S. 705, 714-18 (1984).

7. In *Arizona v. Hicks,* 480 U.S. 321 (1987), the Court held that while a police entry into Hicks' apartment to look for potential shooting victims was valid as an emergency entry, they did not have the authority to lift stereo equipment and look at serial numbers because that search exceeded the scope of the justification for the initial intrusion.

8. *Maryland v. Buie,* 494 U.S. 325 (1990), sustained a protective sweep of premises during an arrest. The Court cautioned, however, that a protective sweep had to be limited to merely looking through the premises for others who could attack the officers or aid the accused in an escape from arrest; they could not perform a search incident. *Id.* at 334-36.

9. In *Minnesota v. Olson,* 495 U.S. 91 (1990), the Court held that houseguests have a reasonable expectation of privacy sufficient to grant them standing to challenge a search of the premises. In so holding, the Court stressed our societal understandings. *Id.* at 100.

10. Similarly, physical seizure of a home was invalidated in *Soldal v. Cook County, supra,* a civil rights action, where an officer stood by and permitted a private citizen to remove a mobile home occupied by another from its underpinnings and take it away. The Court noted the weightier property in a persons home. *Id.* at 544 n. 7.

11. Drug forfeiture seizures of real property implicate the Fourth and Fifth Amendments. Such seizures, however, have too high a risk of error for innocent owners to be acceptable. *United States v. James Daniel Good Real Property,* 114 S.Ct. 492 (1993). So, too, does the failure to announce.

II. THE COMMON LAW AND KNOCK-AND-ANNOUNCE

The common law authorities on this issue have been recounted numerous times; twice in the opinions of this Court in *Miller* and *Ker* and in the opinions of numerous other courts. Therefore, petitioner will not restate what has already been written. Instead, petitioner makes some observations about what those and other authorities further stated which seems to have been overlooked over the years. Furthermore, petitioner submits that the knock-and-announce rule really dates from a 1275 English statute. Thus, the common law rule is at least 720 years old, not just a mere 392.

A. *Semayne's Case* (1603) and the statute it relies on

The earliest reported case which stated the common law knock-and-announce rule is *Semayne's Case,* 5 Co.Rep. 91a, 77 Eng. Rep. 194 (K.B.1603). It is often cited, but those doing so apparently only quote the excerpts in prior cases and do not go to the case itself. For example, *Miller v. United States, supra,* at 308, and *Ker v. California, supra,* at 47 (BRENNAN, J., concurring), both only quote the following (5 Co.Rep. at 91b, 77 Eng.Rep. at 195):

> In all cases where the King is party, the sheriff (if the doors be not open) may break the party's house, either to arrest him, or to do other execution of the K(ing)'s process, if otherwise he cannot enter. *But before he breaks it, he ought to signify the cause of his coming, and to make request to open doors* * * *.

(Emphasis in *Miller*) The ellipsis, however, includes the fol-

lowing significant and usually omitted language:

> . . . and that appears well by the stat. of Westm. 1. c. 17. (which is but an affirmance of the common law) as hereafter appears, for the law without a default in the owner abhors destruction or breaking of any house (which is for the habitation and safety of man) by which great damage and inconvenience might ensue to the party, when no default is in him; for perhaps he did not know of the process, of which, if he had notice, it is to be presumed that he would obey it, and that appears by the book in 18 E. 2. where it is said, that the K's officer who comes to do execution, &c. may open the doors which are shut, and break them, if he cannot have the keys; which proves, that he ought first to demand them, 7 E. 3.

Why this language is always omitted in the case and articles is inexplicable—it further proves that the knock-and-announce rule predates *Semayne's Case* by 328 years. Also, it was statutory and the statute was based on the common law.

The statute referred to, Westminster 1, ch. 17, is reprinted in COKE'S INSTITUTES; SECOND PART OF THE INSTITUTES OF THE LAWS OF ENGLAND ch. 17, at 192-93 (1797). In the notes at the beginning of Coke's chapter 17, it is stated that this statute was passed in the third year of the reign of Edward I, and it is found in 1 STATUTES AT LARGE, FROM THE MAGNA CARTA TO THE END OF THE ELEVENTH PARLIAMENT OF GREAT BRITAIN, ANNO 1761, 3 Edw. I, ch. 17 (D. Pickering ed. 1762), and it was adopted in 1275. It is submitted that this statute is the first clear expression of the first knock-and-announce rule.[17] It states that the sheriff had make a "solemn demand[ ]" before entry to those allegedly in possession of the "beasts of another . . . [who] cause[d] them to be driven into a castle or fortress" and that the person in possession "shall be admonished to make deliverance by the

[17] Cuddihy's dissertation (cited in Part III.B., *infra*) does not mention this statute in the relevant time period. There is, however, no table of statutes in his work to be certain it is omitted.

sheriff or bailiff . . . or . . . he may be conveniently warned by the taker, or by any other to make deliverance . . . ."

It is also sometimes stated that the knock-and-announce language of *Semayne's Case* is mere dicta. *Amici curiae* in support of petitioner do, and presumably so will respondent and its *amici*. Petitioner strongly disagrees; *Semayne's Case* held that it was only restating what a statute codifying the common law already required. It is, therefore, hardly mere dicta.

B. Sir Matthew Hale (1687)

A decade after his death, Sir Matthew Hale's PLEAS OF THE CROWN was published in 1687. Hale wrote, with added notes provided by the editors of the First American edition in 1847,[18] at 116-17:

> If a justice of the peace issues a warrant to apprehend a felon, who is in his own house, and after notice of the warrant and request to open the door it is refused or neglected to be done, the officer may break open the door to take him [20] and the same law is, if it be but for suspicion of felony. 13 *E.* 4. 9. *a.* 5 *Co. Rep.* 91. *b. Semain's* case.(*)
>
> [20] But only upon strong necessity and after notice. *Curtis'* case, *Foster,* 135; 2 *Hawk. ch.* 14, § 1; *Lannock v. Brown,* 2 *B. & Ald.* 592. See *Burdett v. Abbott,* 14 *East.* 163; *State v. Smith,* 1 *N. Hamp.* 346; *Bell v. Clap,* 10 *Johnson,* 263; *State v. Shaw,* 1 *Root,* 134; *Kelsey v. Wright,* 1 *Root,* 83.
>
> (*) *Part* I, *p.* 572.
>
> And so much more may he break open the house of another person to take him, for so the sheriff may do upon a civil process. 5 *Co. Rep.* 93. *a. Semain's* case. But then he must at his peril see that the felon be there, for if the felon be not there, he is a trespasser to the stranger whose house it is;

[18] The First American edition was published by the Clerk of the U.S.Dist.Ct., E.D.Pa., by order of an act of Congress.

but in both cases the officer must first notify his business that he comes about, and demand admission. *Ibidem.*

But in case of warrants to search for stolen goods I think the doors of any person cannot be broken up.

If a warrant of the peace issue from a justice of the peace, the officer or minister of such warrant may break open a door in case of a refusal to open after demand of notice of his business ruled by *Popham* and *Clerk* 3 *Jac. Dalt. cap.* 78, *p.* 204, 205.

C. William Hawkins (1721)

Shortly thereafter, Hawkins published 2 WILLIAM HAWKINS, A TREATISE ON PLEAS OF THE CROWN ch. 14, § 1, at 86-87 (1721), and he stated the rule as "no one can justify the breaking open of another's Doors to make an Arrest, unless he first signify to those in the House the Cause of his coming, and requests them to give him Admittance."

D. *Curtis's Case* (1757)

In 1757, the rule in *Semayne's Case* was applied to a criminal case in *Curtis's Case,* 1 Fost. 135, 168 Rep.Rep. 67 (K.B.1757). Curtis was tried for murder for killing an officer with the blow of an ax to the head as the officer was entering Curtis' house to arrest him on a warrant for escape. The court discussed the holding in *Semayne's Case:*

> The 9 [of 11] judges were of the opinion that no precise form of words is required in a case of this kind. It is sufficient that the party hath notice, that the officer cometh not as a mere trespasser but claiming to act under a proper authority; and if, after this notice, he be resisted, and he or any of his assistants killed in consequence of such resistance, it will be murder; provide it cometh out in evidence that the officer had a legal warrant.

Id., 1 Fost. at 136-37, 168 Eng.Rep. at 68 (bracketed material added). Thus, it may not be murder to kill an officer illegally entering without notice or a warrant.

E. Foster, Coke, Blackstone, and Chitty

Other significant common law authorities recognizing the knock-and-announce rule in substantially similar language prior to the adoption of the Fourth Amendment are: FOSTER, CROWN LAW 323; 4 COKE, INSTITUTES *177; 3 BLACKSTONE, COMMENTARIES *412. A significant post-Fourth Amendment authority is 1 JOSEPH CHITTY, A PRACTICAL TREATISE ON THE CRIMINAL LAW ch. 2, at 52-56 (1816).

III. THE DEVELOPMENT OF THE LAW OF KNOCK-AND-ANNOUNCE IN THE UNITED STATES

A. Historical introduction

Writs of assistance were issued to enforce the customs laws in Massachusetts practically without any legal or moral restraint. The writs created great resentment in the colonists against the governmental power of search and seizure.[19] But, even the infamous writs of assistance were executed with notice to the target of the search. *Ker v. California,* 374 U.S. 23, 52 (1963) (BRENNAN, J., concurring).

James Otis's famous argument in court against the abuse of search and seizure in 1761,[20] as recounted by John Adams fifty years later, "breathed into the nation the breath of life." 2 LEGAL PAPERS OF JOHN ADAMS 122 (1965). The seeds of the American Revolution were sown.

B. The first federal knock-and-announce requirement was adopted by incorporation of state statu-

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[19] N. LASSON, THE HISTORY AND DEVELOPMENT OF THE FOURTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES 55-59 (1937); J. LANDYNSKI, SEARCH AND SEIZURE AND THE SUPREME COURT 31-35 (1966).

[20] RAVITCH, THE AMERICAN READER 10-11 (1990). Otis' argument is recounted in all modern treatises and is discussed in *Boyd v. United States,* 116 U.S. 616, 624-25 (1886).

tes requiring announcement in the Judiciary Act of 1789.

1. Pre-Fourth Amendment state statutes requiring notice and announcement

The dissatisfaction with the way English governors and magistrates permitted general searches caused all the states to pass their own search and seizure statutes, have search and seizure provisions in their constitutions, or both. Accordingly, before the Fourth Amendment was even referred to the states, at least ten of the thirteen states had statutes requiring notice and announcement before execution of warrants. In addition, federal officers were required to follow the law of the states in which they were operating. Finally, it was also the recognized practice for justices of the peace. 2 W. CUDDIHY, THE FOURTH AMENDMENT: ORIGINS AND ORIGINAL MEANING, 602-1791, at 1511-13 (1990) (unpublished doctoral dissertation; Claremont (Cal.) College):

> Unannounced searches were probably a third category of the unreasonable processes that the Fourth Amendment forbade. In most states, custom, practice, or legislation required searchers to request admittance into a house and break in only if they had to.
>
> Every legal manual for American justices of the peace between 1788 and 1791 forbade unannounced, forcible entry to accomplish an arrest. American printers provide only three such manuals: *Conductor Generalis*, which appeared at New York, *The South Carolina Justice*, and a similar book for North Carolinians. Quoting Hawkins, however, the first two of these three books declared unequivocally
>
> > that no one can justify the breaking open of another's doors to make a arrest, unless he first signify to those in the house the cause of his coming and [request] them to give him admittance.
> >
> > Legislation and custom also curtailed the use of force in executing search warrants, whether general or specific. The statutes and legal manuals of at least seven states permitted forcible entry only after a householder had refused to admit a searcher under circumstances that included smuggling, counterfeiting, and trading with the enemy. In another state, Virginia, the impost of 1787 allowed forcible entrance only "when it may be necessary." New Hampshire and Pennsylvania provided a third variation by enacting warrants to force open specific houses where officers had been refused entrance without a warrant. In one way or another, at least ten states required a searcher to think twice before kicking in a door.
> >
> > Neither the Collection Act nor the Excise Act took a position on "no-knock" entries of private dwellings by federal officers. The Judiciary Act of 1789, however, effectively renounced those entries by requiring such officers to accomplish seizures and arrests through the usual legal processes of their resident states.
>
> (footnotes omitted)

2. Congress' adoption of state announcement law by reference in 1789

Congress must be presumed to have knowledge of all these state statutes in existence at the time that it referred the Bill of Rights to the states,[21] particularly in light of the fact that the First Congress also required federal customs officers to follow state search and seizure law.[22] As already stated, the Court held in *Boyd, supra*, at 623, that search and seizure laws passed in that First Congress "which proposed for adoption the original amendments to the Constitution" expressed

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[21] *See McDonald v. Hovey*, 110 U.S. 619, 628 (1884) (part of Judiciary Act of 1789 which follows English law would be given construction of English courts).

[22] The Judiciary Act of 1789 was passed by in the First Session of the First Congress, ch. 20, § 33 (Sept. 24, 1789), 1 Stat. 91.

Congress' intent as to what was a "reasonable" search.[23]

Therefore, the requirement of notice and announcement was incorporated into federal law in 1789 by statute before the Fourth Amendment was even adopted, and this must have been a fundamental part of what was a "reasonable" search.

C. Early state cases

In addition to the statutes in effect in 1789 discussed in Part III.B.1, *supra,* early state cases also applied the knock-and-announce rule. *See* discussion in Wilgus, *Arrest Without a Warrant,* 22 MICH.L.REV. 798, 802 (1924), summarizing these cases as follows:

> Before doors are broken, there must a necessity for so doing, and notice of the authority and purpose to make the arrest must be given and a demand and refusal of admission must be made, unless this is already understood, or the peril would be increased.

See also 2 CUDDIHY, *supra,* at 1344-45.

D. Federal laws on knock-and-announce

1. 18 U.S.C. § 3109

Congress mandated that federal law enforcement officers knock-and-announce since 1917, and, by reference to state law, 1789.

18 U.S.C. § 3109, passed in 1917, provides as follows:

> The officer may break open any outer or inner door or window of a house, or any part of a house, or anything therein, to execute a search warrant, if, after notice of his authority and purpose, he is refused admittance or when necessary to liberate himself or a person aiding him in the execution of the

[23] This was noted in *Carroll v. United States,* 267 U.S. 132, 150 (1925), and *United States v. Ramsey,* 431 U.S. 606, 617-18 (1977).

warrant.

2. The common law under 18 U.S.C. § 3109

In *Miller v. United States,* 357 U.S. 301 (1958), the Court dealt with whether District of Columbia narcotics officers complied with § 3109 in the course of making an arrest. The Fourth Amendment claim was not raised. The Court discussed the common law notions of privacy protected by § 3109, and held that the officers failed to comply.

The Court started with the discussion in *Accarino v. United States,* 85 U.S.App.D.C. 394, 179 F.2d 456 (1949), which noted the common law rules limiting the authority of officers to enter a home to make an arrest. *Miller,* 357 U.S. at 306-08. The Court separately discussed the common law limits on the power of entry to make an arrest:

> Whatever the circumstances under which breaking a door to arrest for felony might be lawful, however, the breaking was unlawful where the officer failed first to state his authority and purpose for demanding admission. The requirement was pronounced in 1603 in *Semayne's Case,* 5 Coke Co.Rep. 91a, 11 E.R.C. 629, 77 Eng.Repr. 194, at 195: "In all cases where the King is party, the sheriff (if the doors be not open) may break the party's house, either to arrest him, or to do other execution of the K(ing)'s process, if otherwise he cannot enter. *But before he breaks it, he ought to signify the cause of his coming, and to make request to open doors* * * *." (Emphasis supplied.)
>
> The requirement stated in *Semayne's Case* still obtains. It is reflected in 18 U.S.C. § 3109, in the statutes of a large number of States, and in the American Law Institute's proposed Code of Criminal Procedure, § 28.

Id. at 308-09 (footnotes omitted).

The Court found that the officers failed to announce as required by the statute and reversed.

> The rule seems to require notice in the form of an ex-

press announcement by the officers of their purpose for demanding admission. The burden of making an express announcement is certainly slight. A few more words by the officers would have satisfied the requirement in this case. It may be that, without an express announcement of purpose, the facts known to officers would justify them in being virtually certain that the petitioner already knows their purpose so that an announcement would be a useless gesture. Cf. *People v. Martin,* 45 Cal.2d 755, 290 P.2d 855; Wilgus, Arrest Without a Warrant, 22 Mich.L.Rev. 541, 798, 802 (1924). But even by that test the evidence upon which the Government relies was not sufficient to justify the officers' failure expressly to notify the petitioner that they demanded admission to his apartment for the purpose of arresting him.

The single fact known to the officers upon which the Government relies is the "split-second" occurrence in which the petitioner evinced "instantaneous resistance to their entry," an "almost instinctive attempt to bar their entry after they (the officers) had identified themselves as police * * *." It is argued that this occurrence "certainly points up that he knew their purpose immediately * * * (and), at once, realized that he had been detected and that the officers were there to arrest him"; that "(i)t would be wholly unrealistic to say that the officers had not made their purpose known because they did not more formally announce that they were there to arrest him."

Id. at 309-11.

Congress originally adopted the federal knock-and-announce statute in 1917, and it has an interesting and telling lineage. It is based on a 1782 New York statute which was based on the common law rule of *Semayne's Case*.

Section 3109 was originally adopted in two sections in the Espionage Act of 1917, Title XI, §§ 8-9, 40 Stat. 229 (enacted June 15, 1917), which provided:

> § 8. The officer may break open any outer or inner door or window of a house, or any part of a house, or anything therein, to execute the warrant, if, after notice of his authority and purpose, he is refused admittance.

> § 9. He may break open any outer or inner door or window of a house, for the purpose of liberating a person who, having entered to aid him in the execution of the warrant, is detained therein, or when necessary for his own liberation.

The language of this Act is not, and apparently never was intended to be, limited to espionage cases. In its cryptic Conference Report, the House of Representatives stated that the entire title on search warrants in the statute "was based on the New York law on this subject, and follows generally the policy of that law. It has been written into many provisions of the title as passed by the House."[24] The New York statute Congress was obviously referring to, indeed, the only one in effect at the time, was N.Y. Code Crim. Proc. §§ 799-800[25] adopted in 1881, and it is virtually restated in these sections.

The predecessor to that New York search and seizure statute was adopted nine years before the Fourth Amendment. N.Y. Stat., 5th session, ch. 39, § III (adopted April 13, 1782), N.Y. STATE LAWS 1777-84, at 480. It permitted a breaking to enter to execute a search warrant for "contraband goods" "if admittance shall be refused."[26]

3. Application of Espionage Act to Prohibition cases

Apparently the first case decided under the search and seizure provisions of the Espionage Act of 1917 was *Giles v. United States,* 284 F. 208, 209-12 (1st Cir.1922), which held

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[24] H.R. Conf. Rep. 65, 65th Cong., 1st Sess., at 20 (May 29, 1917).

[25] They are now codified as N.Y. Crim. Proc. Law § 690.50 (McKinney 1993).

[26] One of the most cited common law cases decided after the adoption of this statute, is *Bell v. Clapp,* 10 Johns. (N.Y.) 263, 265-66 (1813) (*per curiam*), that an officer may enter to execute a warrant only after announcing his identity and purpose.

that its search warrant provisions applied to searches under the National Prohibition Act, that era's version of the "war on drugs." In fact, the language of the statute apparently was considered applicable to all federal searches. *Id.* at 212.

And, this is just how it was construed thereafter.

4. The federal drug "no-knock" law and its repeal

In 1970, Congress felt that it could aid the "war on drugs" by granting the Justice Department one of its wishes: "no-knock" search warrants in drug cases.[27] Congress and the public were aware of the potential for abuses in no-knock warrant execution.[28] Nevertheless, the experiment began with the adoption of a no-knock provision in § 509(b) of the Comprehensive Drug Abuse, Prevention, and Control Act of 1970, Pub.L. No. 91-513, 84 Stat. 1236, 1274 (1970).[29]

By 1974, the abuses of the no-knock exception became legendary. Between 1970 and 1974, over 100 newspaper articles were inserted into the Congressional Record demonstrating the sordid abuses of no-knock warrant execution: while defending their homes, innocent householders shot and killed police officers and police officers shot and killed innocent householders, some of whom were doing virtually nothing and posing no threat to anyone.[30] In debates over the repeal of the federal no-knock law, the legendary Senator Sam Ervin argued that preapproved no-knock warrants violated the probable cause requirement of the Fourth Amendment.[31]

Congress finally voted to repeal the no-knock provision of the federal drug laws. Appropriations—Controlled Substances Act of 1974, Pub.L. No. 93-481, § 3, 88 Stat. 1455, 1456 (1974).[32]

The federal no-knock statute repeated the same abuses which led to the American Revolution: unbridled governmental power to invade the homes of citizens in certain types of cases leads to abuse of innocent citizens. There are adequate exceptions to the knock-and-announce requirement (*see* Part VI, *infra*), and a wily officer claiming an exception can easily create a de facto no-knock situation literally just be making it up. But, the policy of the common law rule of announcement was to protect against violence in announced police invasions of the home. The experience with no-knock laws shows that the threat to privacy and sanctity of the home still holds true.[33]

E. The Supreme Court's interpretations of knock-and-announce policy underlying the rule

This Court has directly addressed the knock-and-announce rule three times: *Miller v. United States,* 357 U.S.

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[27] *See generally* Note, *The Knock and Announce Rule: A New Approach to the Destruction of Evidence Exception,* 93 COLUM.L. REV. 685, 703-05 (1993); J. BOVARD, LOST RIGHTS 234-39 (1994).

[28] H.R.Rep. No. 907, 91st Cong., 2d Sess. 202 (1970), reprinted in 1970 U.S.C.C.& A.N. 4653-57 (stating the view opposed to adoption); Note, *Unannounced Entry to Search: The Law and the "No-Knock" Bill (S. 3246),* 1970 WASH.U.L.Q. 205.

[29] Congress also adopted a similar no-knock law for the District of Columbia. District of Columbia Court Reform and Criminal Procedure Act of 1970, Pub.L. No. 91-358, § 210(a), 84 Stat. 473, 630 (1970) (repealed by Appropriations—Controlled Substances Act of 1974, Pub.L. No. 93-481, § 4, 88 Stat. 1455, 1456 (1974)).

[30] The Congressional Record references are cited in Note, *supra,* 93 COLUM.L.REV. at 705 n. 133.

[31] 120 Cong. Rec. 22,884 (1974), quoted in Note, 93 COLUM. L.REV. at 704.

[32] *See also* H.R. Conf. Rep. No. 1442, 93rd Cong., 2d Sess. 3 (1974), reprinted in 1974 U.S.C.C.& A.N. 5974, 5976-78.

[33] The current abuses of no-knock searches are recounted in BOVARD, *supra,* at 234-39.

301 (1957); *Ker v. California,* 374 U.S. 23 (1963); and *Sabbath v. United States,* 391 U.S. 585 (1968). It has not yet resolved the constitutional question in this case.

1. In an early case, one member of the Court assumed that some kind of notice was required. As early as 1948, Justice Jackson, concurring in *McDonald v. United States,* 335 U.S. 451, 460-61 (1948),[34] quoted in the text in Part V.B., *infra,* noted the great risk of violence in unannounced police entries to both citizens and officers.

2. *Miller* dealt with whether federal officers complied with 18 U.S.C. § 3109 in the execution of a search warrant. The Court held that § 3109 was a codification of the common law requirement of announcement, and the officers failed to comply with it. *Miller,* 357 U.S. at 308, quoted *supra.*

Ten years later, the Court held in *Sabbath* that officers failed to comply with the knock-and-announce requirement of § 3109 and held that "breaking" under the statute was to be interpreted under the common law definition of any physical entry. *Sabbath,* 391 U.S. at 589-91.

3. Five years after *Miller,* the Court in *Ker* did not reach a direct consensus on the constitutional question, apparently because the plurality felt that it did not have to. The plurality opinion held that the officers had exigent circumstances to dispense with the requirement of the warrant. *Ker,* 374 U.S. at 38-40, citing Wilgus, *supra,* 22 MICH.L.REV. at 800-06. The plurality reaffirmed the knock-and-announce requirement. *Ker, supra,* at 40. The plurality held that the entry complied with the recognized exceptions to the California knock-and-announce rule and was, therefore, reasonable under the Fourth Amendment. *Id.* at 40-41.

Justice Brennan, writing for the four concurring Justices,

[34] Justice Jackson's opinion was cited and partially quoted by Justice Brennan in *Ker, infra,* at 58 n. 12, and in *Miller, infra,* at 313 n. 12.

however, concluded that the knock-and-announce rule of the common law was so well established that it was thus a part of the Fourth Amendment. *Id.* at 47-59 (BRENNAN, J., concurring). Justice Brennan noted that even "service of the general warrants and writs of assistance was usually preceded at least by some form of notice or demand for admission." *Id.* at 52.

Justice Brennan also noted the "compelling considerations" protected by the knock-and-announce rule: (1) protection against mistaken entries of innocent householders which will shock them and disrupt their privacy, and (2) protection against violence by and against householders. *Id.* at 57-58.

Thus, it can fairly be concluded that eight Justices in *Ker* concluded that the knock-and-announce rule was a part of the Fourth Amendment. Indeed, commentators have concluded that *Ker* constitutionalized the knock-and-announce rule.[35]

F. Current state statutes and cases applying the knock-and-announce requirement help determine Fourth Amendment reasonableness

The common law knock-and-announce rule is and always has been the law in the overwhelming majority of states. Indeed, at least forty-one states adhere to the knock-and-announce rule by statute (Appendix A, *infra,* at A-3—A-6) or caselaw (Appendix B, *infra,* at A-7—A-8). Furthermore, it applies to all federal searches, seizures, and arrests (Appendix C-1, *infra,* at A-9) as well as those in United States territories (Appendix C-2, *infra,* at A-9). Only a few states, such as Arkansas in this case, specifically reject any knock-and-announce requirement. (Appendix D, *infra,* at A-10)

[35] *See, e.g.,* Sonnenreich & Ebner, *No-Knock and Nonsense: An Alleged Constitutional Problem,* 44 ST.JOHN'S L.REV. 626, 643 (1970); Blakely, *The Rule of Announcement and Unlawful Entry:* Miller v. United States *and* Ker v. California, 112 U.PA.L.REV. 499, 551 (1964); Note, *supra,* 93 COLUM.L.REV. at 693-94.

This "clear consensus among the States adhering to th[is] well-settled common-law rule" is entitled to great deference in this Court in determining what the Fourth Amendment requires for a "reasonable" search. *Payton,* 445 U.S. at 590.[36] As previously stated, *Payton* and *Boyd,* 116 U.S. at 623, also leaned heavily on the actions of Congress in determining what Fourth Amendment reasonableness requires.

Congress has spoken most eloquently on the knock-and-announce requirement by its actions in: (a) first requiring federal officers follow state search and seizure law that it knew required notice and announcement in the Judiciary Act of 1789 (*see* Part III.B.2., *supra*); (b) then adopting the announcement requirement of 18 U.S.C. § 3109 in 1917 (*see* Part III.D.2.b., *supra*); (3) by affirming its intention on the scope of the application of the statute far beyond espionage cases by not limiting *Giles;* and (4) then repealing the ill-fated federal drug "no-knock" search and seizure law after four years of abuse and deadly mistakes (*see* Part III.D.4., *supra*).

That is a clear expression of what is "reasonable" under the Fourth Amendment.

IV. The common law as a basis for construing the Fourth Amendment.

The common law has long provided significant, if not decisive, guidance as to what the Framers of the Fourth Amendment thought was a reasonable search, particularly when the sanctity of the home is at issue.

A. Historical view

[36] *Payton, supra,* at 590 & n. 5 (bracketed material added) (quoting and citing *United States v. Watson,* 423 U.S. 411, 423 (1976) construing the common law rule that an officer with probable cause has the power to arrest a suspected felon in a public place).

It has been said that the Fourth Amendment did not create any new rights; it only reaffirmed the common law right to be free from unreasonable searches and seizures.[37] In the Court's first Fourth Amendment case, *Boyd, supra,* at 624-25 it said that past abuses defined Fourth Amendment reasonableness:

> In order to ascertain the nature of the proceedings intended by the fourth amendment to the constitution under the terms "unreasonable searches and seizures," it is only necessary to recall the contemporary or then recent histories of the controversies on the subject, both in this country and in England.

The Court recounted the history of the infamous writs of assistance, James Otis' famous courtroom argument against the tyranny of unreasonable searches and seizures under the writs in Massachusetts, and stated that *Entick v. Carrington,* 19 How.St.Tr. 1029 (K.B.1765), also expressed the intent of the Framers. *Boyd,* 116 U.S. at 626-27. In addition, the Court found legislation adopted contemporaneously with the referral to the states of the Fourth Amendment touching on searches and seizures in collection of import duties as having relevance to what the Framers considered "unreasonable." *Id.* at 623.

As previously stated, the Court followed *Boyd* on this

[37] 3 J. Story, Commentaries on the Constitution of the United States ch. 44, ¶ 1903, at 679 (3d ed.1858) ("The Fourth Amendment is little more than the affirmance of a great constitutional doctrine of the common law.") (the first edition is quoted in *County of Riverside v. McLaughlin,* 500 U.S. 44, 70 (1991) (Scalia, J., dissenting)); Lasson, *supra,* at 43; Landynski, *supra,* at 100. "Unreasonable search and seizure is forbidden by the common law, and by the Fourth Amendment to the Constitution of the United States . . . , which is but declaratory of the common law on the subject." *McClannan v. Chaplain,* 136 Va. 1, 14, 116 S.E. 495, 498 (1923).

issue in *Carroll v. United States,* 267 U.S. 132, 149-50 (1925), where the Court stated that the Fourth Amendment right to be free from unreasonable searches and seizures "is to be construed in the light of what was deemed an unreasonable search and seizure when it was adopted." *Id.* at 149 (quoted in *Minnesota v. Dickerson,* 113 S.Ct. 2130, 2139 (1993) (SCALIA, J., concurring).[38])

B. Modern view

The Court regularly looks to the common law to determine the "reasonableness" of police activity under the Fourth Amendment. *See, e.g., Tennessee v. Garner,* 471 U.S. 1, 13 (1985); *United States v. Watson, supra,* at 418-19; *Gerstein v. Pugh,* 420 U.S. 103, 111, 114 (1975); *Carroll v. United States, supra,* at 149-57. The common law is sometimes considered the touchstone of Fourth Amendment "reasonableness." *See, e.g., California v. Hodari D.,* 499 U.S. 621, 624-29 (1991); *County of Riverside v. McLaughlin,* 500 U.S. 44, 66 (1991) (SCALIA, J., dissenting); *California v. Acevedo,* 500 U.S. 565, 583 (1991) (SCALIA, J., concurring in the judgment). Most simply put, the question is: Would the Framers of the Fourth Amendment sanction the search at issue? *Steagald v. United States, supra,* at 220.

In *Payton v. New York, supra,* at 591-97, the Court examined the common law at great length in determining whether the police needed a warrant to enter a home to make

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[38] *Dickerson, supra,* (SCALIA, J., concurring):

> The purpose of the provision, in other words, is to preserve that degree of respect for the privacy of persons and the inviolatibility of their property that existed when the [Fourth Amendment] was adopted—even if a later, less virtuous age should become accustomed to considering all sorts of intrusion "reasonable."

(bracketed material added)

a routine felony arrest. The Court concluded: "An examination of the common-law understanding of an officer's authority to arrest sheds light on the obviously relevant, if not entirely dispositive, consideration of what the Framers of the [Fourth] Amendment might have thought to be reasonable." *Id.* at 591 (bracketed material added).

Earlier, the Court considered numerous common law authorities in finding that the common law and Fourth Amendment permitted an officer to follow a fleeing arrestee into a house and make an arrest. *Watson, supra,* at 418-22.

Other examples of the Court following the common law to determine Fourth Amendment reasonableness are as follows:

1. Common law standards and procedures for arrest and detention. *Gerstein, supra; Watson, supra; Steagald v. United States, supra,* at 217 n. 10.[39]

2. The definition of seizure of the person. *Hodari D., supra,* at 626 n.2.

3. The common law search incident doctrine. *United States v. Robinson,* 414 U.S. 218, 230-33 (1973).

4. Probable cause permits arrest for a felony. *Coolidge v. New Hampshire,* 403 U.S. 443, 511 n. 1 (1971) (WHITE, J., concurring and dissenting); *Trupiano v. United States,* 334 U.S. 699, 705 (1948); *Carroll, supra,* at 156-57.

5. The definition and scope of the curtilage. *California v. Ciraolo,* 476 U.S. 207, 212 (1986); *United States v. Dunn,* 480 U.S. 294, 300 (1987). However, the common law of trespass is not controlling in determining the scope of the reasonable expectation of privacy under the open fields doctrine. *Hester v. United States,* 265 U.S. 57, 59 (1924); *Oliver v. United States,* 466 U.S. 170, 180 (1984).

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[39] *See also County of Riverside v. McLaughlin, supra,* at 62 (SCALIA, J., dissenting); *Albright v. Oliver,* 114 S.Ct. 807, 815 (1994) (GINSBURG, J., concurring) (bail is continued detention).

C. Consideration of changing times

The social expectation of the times has always been considered relevant to the consideration of the application of the common law and the Fourth Amendment.[40] And, what was permissible at common law may not be under current mores.

The *Payton* Court noted that the development of Fourth Amendment doctrine "has not simply been frozen into constitutional law those law enforcement practices that existed at the time of the Fourth Amendment's passage." *Id.* at 591 n. 33, quoted in *Steagald v. United States, supra,* at 217 n. 10, and *Tennessee v. Garner, supra,* at 13. In *Garner,* the Court held that the common law police authority to shoot and kill a fleeing nonviolent felon no longer was valid in light of current social values.[41] *See also Hodari D., supra,* at 637

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[40] Societal understandings also form the basis of the second prong of the expectation of privacy standard of *Katz v. United States,* 389 U.S. 341, 361 (1967) (HARLAN, J., concurring). *See, e.g., Minnesota v. Olson, supra,* at 100 (standing of houseguest); *Skinner v. Railway Labor Executives Asso.,* 489 U.S. 602, 617 (1989) (privacy interest in collection of urine); *O'Connor v. Ortega,* 430 U.S. 709, 716-17 (1987) (privacy interest in a desk at work).

[41] The respondent will likely argue the converse of this question: Can current social values alter the common law rule in a way that diminishes, rather than enlarges, individual liberty? We submit that Justice Scalia indicated in *Dickerson, supra,* at 2139, that they cannot:

> The purpose of the provision, in other words, is to preserve that degree of respect for the privacy of persons and the inviolatibility of their property that existed when the [Fourth Amendment] was adopted—even if a later, less virtuous age should become accustomed to considering all sorts of intrusion "reasonable."

(bracketed material added) *See also County of Riverside, supra,* at 66 (SCALIA, J., dissenting).

(STEVENS & MARSHALL, JJ., dissenting).

V. THE POLICIES OF THE KNOCK-AND-ANNOUNCE RULE STILL APPLY IN 1995

The policies recognized at common law underlying the knock-and-announce rule are: (A) protection of fundamental and overall privacy interests in the home by (1) permitting the target of the search to surrender his or her privacy under the processes of the law, and (2) granting the police and householder an opportunity to avoid searches of the wrong place or arrests or searches of otherwise innocent persons; (B) protection against violence by startled householders or nervous police officers waving guns at everybody in the house during a highly charged situation that invites the use of deadly force; and (C) protection against unnecessary destruction of private property.

For seven centuries, the common law has held the privacy right in the home to be a paramount interest. Society certainly has changed since 1275 and 1603. Nevertheless, the interests recognized in the common law are still valid today. Indeed, they may be more important today.

A. Protection of privacy interests

The privacy interests in the home protected by the Fourth Amendment are, without doubt, substantial. *See* Part I.A., *supra*. Accordingly, courts have not been grudging in their application of the knock-and-announce rule,[42] and this

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This issue is pending in *Stevens v. Wisconsin,* pet. for cert. pending, 93-9026. The Wisconsin Supreme Court held that the common law had to give way to the realities of the drug culture. *State v. Stevens,* 181 Wis.2d 410, 511 N.W.2d 591, 594-96 (1994).

[42] *See generally* Annots., *What constitutes violation of 18 U.S.C.S. § 3109 requiring federal officer to give notice of his authority and purpose prior to breaking open door or window or*

Court is no exception.

For example, *Miller v. United States, supra,* the Court held that while it would not take much for the government to comply with the knock-and-announce requirement, the rule serves important purposes and must be closely followed. *Id.* at 309-10. The mere fact that the defendant attempted to close the door on the officers did not show that he knew who they were or what their purpose was. *Id.* at 311. The Court held that the officers did not comply with 18 U.S.C. § 3109, so the defendant could not be arrested in his home without officers first giving him notice. *Miller,* 357 U.S. at 313-14.

Similarly, in *Sabbath v. United States,* 391 U.S. at 589-90, the Court held that the "breaking" requirement in § 3109 did not require a physical breaking. Thus, merely using a key or turning a doorknob is a "breaking."[43]

These policies underlying the requirement of announcement apply to the innocent and guilty alike. After all, an innocent householder is more likely to defend his or her house believing that the entry is by a criminal. Likewise, even the guilty, such as in *Mincey,* may believe that they are being robbed and defend themselves. Even business owners have reason to fear unannounced entries after hours.[44]

We are, after all, talking about homes. Just what can one expect is going on inside? In *Hall v. Shipley,* 932 F.2d

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other part of houses to execute search warrant, 21 A.L.R.Fed. 820 (1974); *What constitutes compliance with knock-and-announce rule in search of premises—state cases,* 70 A.L.R.3d 217 (1976).

[43] *Id.* at 590 ("The protection afforded by, and the values inherent in, § 3109 must be 'governed by something more than the fortuitous circumstance of an unlocked door.'").

[44] Some horrible, violent crimes have occurred during criminal entries into businesses through the back door after closing time. *See, e.g., Holloway v. Arkansas,* 435 U.S. 475 (1978) (rape of waitresses during robbery of closed business).

1147 (6th Cir.1991), officers executing a search warrant for a small quantity of marijuana used a battering ram to break down Hall's apartment door because they heard sounds from inside that indicated to them the drugs were being destroyed. What they heard was Hall making love with his girlfriend. He was detained in the nude and not permitted to dress. The search produced a small quantity of marijuana, but he was not prosecuted; the prosecuting attorney declined because of the small amount involved.

The values the knock-and-announce rule is designed to protect are served by giving the suspect the opportunity to surrender his or her privacy to the warrant, the processes of the law. When the suspect does that, the other interests are automatically served as well.

B. Protection against violence

While the policy of protection of privacy interests is more idealistic, the policy of protection against violence is more basic, realistic, and now appreciated by virtually everyone with a television.

With nightly reruns of "COPS" on the Fox Television Network and all its affiliates, we all get to see police officers armed with search warrants, laser-sighted assault weapons and semiautomatic handguns, battering rams, and stun grenades invade the homes of fellow citizens suspected of crime. The officers talk freely for the camera about protecting themselves during raid. It is heady stuff to see the SWAT Team at the ready, their adrenaline pumping, readying to kick down the door of a suspected drug dealer's home. The officers are trained to expect the worst, and they are carrying cocked weapons pointed at people they fear may be violent. They are trained to shoot first and ask questions later.[45]

There is a grave potential for violence in any unannounc-

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[45] It is a common refrain by law enforcement officers that they "would rather be judged by twelve than carried by six."

ed entry into occupied premises, whether by the police or anyone else.[46] The early common law cases recognized it. (*See Curtis's case, supra,* Part II, where the unannouncing officer was killed with an ax.) As early as 1948, Justice Jackson, concurring in *McDonald v. United States,* 335 U.S. 451, 460-61 (1948), noted the great risk of violence in unannounced police entries:

> I am the less reluctant to reach this conclusion because the method of enforcing the law exemplified by this search is one that is certain to involve the police in grave troubles if continued. That it did not do so on this occasion was due to luck more than to foresight. Many homeowners in this crime-beset city doubtless are armed. When a woman sees a strange man, in plain clothes, prying up her bedroom window and climbing in, her natural impulse would be to shoot. A plea of justifiable homicide might result awkwardly for enforcement officers. But an officer seeing a gun being drawn on him might shoot first. Under circumstances of this case, I should not want the task of convincing a jury that it was not murder. I have no reluctance in condemning as unconstitutional a method of law enforcement so reckless and so fraught with danger and discredit to law enforcement agencies themselves.

It is universally understood in America that householders can defend their home.[47] The ability to shoot first and ask questions later applies with greater force to one whose habitation is being invaded. For example, Ark. Code Ann. § 5-

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[46] In addition, the first judicial finding of justifiable homicide may have occurred in 1256 when a servant of a householder killed "a lunatic chaplain [who] had broken into a house by night." 2 F. POLLOCK & F. MAITLAND, THE HISTORY OF ENGLISH LAW ch. VIII, § 2, at 478-79 (2d ed.1899) (bracketed material added).

[47] MODEL PENAL CODE §§ 3.04(2)(b), 3.06(3)(d), 3.07(5) (Official Draft 1962; 1985 ed.) & *Commentary* at 91 (follows common law); RESTATEMENT (SECOND) TORTS § 79, Comment *b*, illusrations 1-2.

2-620 (Repl.1993) provides:

> (a) The right of an individual to defend himself and the lives of persons or property in his home against harm, injury, or loss by persons unlawfully entering or attempting to enter or intrude thereupon is reaffirmed as a fundamental right to be preserved and promoted as a public policy in this state.
>
> (b) There shall be a legal presumption that any force or means used to accomplish such purpose was exercised in a lawful and necessary manner, unless that presumption is overcome by clear and convincing evidence.
>
> (c) The above-stated public policy shall be strictly complied with by the courts, and appropriate instructions thereof shall be given to juries sitting in trial of criminal charges brought in connection therewith.[48]

Underscoring this argument now are three revealing statistics: 42% of America's 96.4 million households have some kind of firearms[49] and we have 225 million handguns.[50] When

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[48] Indeed, what about armed criminals pretending to be police? This is the new pattern of armed robbery in Little Rock. Barnes, "Kicking in doors new trend among thieves," *Arkansas Democrat-Gazette,* Jan. 21, 1995, 1A, 12A. Police recommend shooting:

> [LRPD Det.] Quattlebaum said many of the robbers in the past three months have told their victims they are police officers. Anyone who suspects a person at the door is not who he says he is should phone 911 and ask for a uniformed officer.
>
> But when an attacker just kicks down the door, there is little the occupant can do.
>
> "If you are at home, you carry a big shotgun," Quattlebaum said. "And if they burst through the door, you blow them back."

Id. at 12A (col. 4-5) (bracketed material added).

[49] STATISTICAL ABSTRACT OF THE UNITED STATES (1992), Tables 409 (pistols, 24%; shotguns, 27%; rifles, 23%; any kind of firearm, 42%) & 702, respectively.

Semayne's Case was decided, pistols and rifles had only recently been invented, but they were single shot, crude, inaccurate, and limited to the military. It does not follow, however, that the fact there is a large number of firearms in this country creates a compelling need to eliminate or modify the common law rule because of "changing times." If so, the government could argue that the sheer number of guns in America creates a "strong suspicion" (a 42% likelihood) to believe that *any* suspect has a gun. If anything, these facts should reinforce the need for the knock-and-announce rule to prevent unnecessary harm to all concerned.

Any society that values life sufficient to change the common law rule to preserve life (as *Tennessee v. Garner* shows we do) should expect no more. Being the target of an erroneous search and having a cocked gun stuck in one's face by a police officer ready and willing to shoot should not be a risk, duty, or an incidence of citizenship.

C. Protection of property

When police officers have to kick in or batter down doors, they damage property.[51] But there is more to it than just a broken door jamb or window: after the officers leave, whether the householder was arrested or not, until it is repaired, the house and its occupants and contents are now easy prey to any petty criminal that wants in. But, the householder is in jail (or, worst, the hospital or morgue). Having suffered the indignity of execution of a search warrant, whether justified or not, no citizen needs to be made a burglary victim because the police do not want to be responsible to secure the premises.

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[50] This statistic is taken from the "handgun clock" overlooking Times Square in New York City as of the end of 1994.

[51] Sometimes they do so even when the householder consents to entry. *Rivera v. United States*, 728 F.Supp. 250, 253-55 (S.D. N.Y.1990).

VI. Exceptions to the knock-and-announce rule at common law, in 1995, and in this case

A. The common law exceptions

The three common law exceptions to the knock-and-announce requirement are: (1) useless gesture (the person whose property is to be searched is not there or he or she knows the officer to be one); (2) possible destruction of evidence (based on information within the officer's knowledge that the sought after evidence will likely be destroyed before entry can be obtained; the rationale for no-knock warrants; *see, e.g., Ker, supra,* at 40-41,; and (3) apprehension of peril (based on information within the officer's knowledge that the person who is the target of the search could likely use deadly force to repel the searchers). Every authority and all states and the federal courts recognize these exceptions. *See generally* 2 W. LaFave, Search and Seizure § 4.8(d-f) (2d ed.1987); 2 J. Hall, Search and Seizure §§ 44:11-44:13 (2d ed.1993); Annots., note 42, *supra.*

If petitioner prevails, these common law-based exceptions will still apply under the Fourth Amendment for the same reasons that the knock-and-announce rule does: they define Fourth Amendment reasonableness. The first exception is based on lack of any possible prejudice to the householder because no one was there who was at risk by lack of announcement. The other two are based on exigent circumstances.

B. Exceptions in 1995

The "useless gesture" exception is simple and unremarkable, and it has not changed over time. The questions are simple: Did the target of the search recognize before the entry that the officer was one such that announcement was superfluous? Was there anyone home or capable of hearing to answer the knock at the door?

The two exigency-based exceptions in the "war on drugs" are examples of exceptions swallowing the rule.

The "destruction of evidence" exception is the easiest to abuse. Practically any amount of drugs could be claimed to be flushable. In fact, prosecutors have argued that the mere existence of indoor plumbing creates exigent circumstances.[52]

The "risk of peril" exception is also easy to abuse, but the courts require proof of an articulable risk of violence to justify dispensing with the knock-and-announce requirement. We could literally see prosecutors arguing that since half of the households have firearms, there is always probable cause to invoke this exception. Case law, however, does not support such a rule because there needs to be an articulable fear that the firearms would be used. *See* Annots., note 42, *supra*.

These two exceptions can easily be invoked together by police bootstrapping them. *See, e.g., United States v. Bonner,* 277 U.S.App.D.C. 271, 874 F.2d 822, 826-27 (1989).

C. Exceptions here?

Here, there are no possible claims of any exception to the knock-and-announce requirement.

First, the state asserted no possible exceptions at the suppression hearing, and none were testified to or even alluded to anywhere in the testimony or the affidavit for the warrant or any other papers in the case.

[52] *See, e.g., State v. Bell,* 564 So.2d 1235 (Fla.App.1990); *State v. Bamber,* 592 So.2d 1129 (Fla.App.1991); *State v. Meyer,* 311 N.W.2d 520, 523-24 (Neb.1981) (courts can take judicial notice that existence of plumbing makes it easier to flush drugs); Note, 93 COLUM.L.REV. at 699-701. This is the issue before the Court in *Stevens v. Wisconsin,* petition for cert. pending, No. 93-9026, because the Wisconsin court held that there was a "drug case exception" to the notice requirement. *State v. Stevens, supra.*

All American building codes require that plumbing systems have access for cleaning, and the police can easily place a trap in the line under or next to the house. They can also turn off the water, and the occupants get (at best, depending on the fixture) only one flush.

Second, the affidavit for the search warrant (J.A. 46-48), the search warrant itself (J.A. 47-48), and the facts of the execution of the warrant (Testimony of Dets. Efird and Walls) show that there were none. The key is the nighttime search provision in the search warrant: if destruction of evidence were a risk, why would the judge grant three days in which to search? Also, the judge could not make any finding that there was a risk of destruction of evidence on the record before him, so a nighttime search could not be authorized. *See* note 7, *supra*. Thus, the search warrant itself states that there was no exigency:

> (Choose One)
> (✓) This warrant shall be executed between the hours of 6:00 a.m. and 8:00 p.m.
> or
> ( ) I find reasonable cause to believe that:
> ( ) the place to be searched is difficult of speedy access.
> ( ) the objects to be seized are in danger of imminent removal.
> ( ) the warrant can only be safely or successfully executed at nighttime or under circumstances the occurrence of which is difficult to predict with accuracy and authorized the execution of this warrant at any time, day or night . . . .

J.A. 47-48. When the warrant was executed, it was quite obvious that the officers did not fear any violence against them; they did not approach stealthily (but neither were they obvious), they entered without guns drawn and there was no confrontation. While a small handgun was a subject of the search, and it was found on a table in the living room, there was no move by anyone in the room for the gun. Therefore, based on the record already made and uncontradicted facts,

there were no exigent circumstances.

It probably is not, however, be necessary to reach this issue even if the Court holds in petitioner's favor and finds that the common law knock-and-announce requirement is a part of Fourth Amendment reasonableness.

CONCLUSION

The Framers of the Fourth Amendment expected the knock-and-announce requirement to apply to searches and entries of homes. Therefore, the knock-and-announce requirement is constitutionally required by the Fourth Amendment.

The judgment of the Arkansas Supreme Court should be reversed and the cause remanded.

Respectfully submitted,

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January 1995 *Attorney for Petitioner*

APPENDICES

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APPENDIX A
State statutes requiring notice

Statutes in at least 33 states require notice before entry for arrest or execution of search warrant (where breaking or force is separately mentioned, it is noted):

Alabama: Ala.Code § 15-5-9 (Repl.1982) (search warrant; origin from 1852)

Alaska: Alaska Stat. §§ 12.25.040 & -.1001 (1990) (breaking permitted)

Arizona: Ariz.Rev.Stat. §§ 13-3916(B) (search warrant) & 13-3891 (arrest) (1989); *State v. Wright,* 131 Ariz. 578, 643 P.2d 23, 25 (App.1982) (knock-and-announce constitutionally compelled)

Arkansas: Ark. Code Ann. § 16-81-107 (1987) (arrest)[1]

California: Cal.Penal Code §§ 844 (arrest) & 1531 (West 1989) (search warrant; breaking) (both have origins from 1872); *People v. Jacobs,* 43 Cal.3d 472, 233 Cal.Rptr. 323, 729 P.2d 757, 764 (1987) (knock-and-announce constitutionally compelled); *People v. Gonzalez,* 211 Cal.App.3d 1043, 259 Cal.Rptr. 846, 848 (1989) (same)

Florida: Fla.Stat.Ann. §§ 901.19(1) (arrest) & 933.09 (1985) (breaking permitted) (origins from 1923 and 1939, respectively); *Benefield v. State,* 160 So.2d 706, 710 (Fla.1964) (knock-and-announce constitutionally compelled); *see Napoli v. State,* 596 So.2d 782, 783-84 (Fla.App.1992)

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[1] Note the anomoly here. Arkansas statutorily requires notice of an entry solely to effect an arrest, but this case holds that no notice is required for an entry to arrest *and search* under Ark.R.Crim.P. 13.3(e) (*see* Appendix D).

Georgia: Ga.Code Ann. § 17-5-27 (1990) (reasonable force permitted; origin fron 1863)

Hawaii: Haw.Rev.Stat. §§ 803-11 (arrest) & 803-37 (1988) (breaking permitted)

Idaho: Idaho Code §§ 19-611 (arrest) & 19-4409 (1969) (breaking permitted) (both have origins from 1864)

Indiana: Ind.Stat.Ann. § 35-33-5-7 (1981) (breaking permitted); *State v. Dusch,* 289 N.E.2d 515, 517 (Ind.1972) (knock-and-announce constitutionally compelled)

Iowa: Iowa Code Ann. §§ 755.9 (arrest) & 808.6 (breaking permitted; origin from 1851) (1954); *State v. Brown,* 253 N.W.2d 601, 602 (Iowa 1977) (knock-and-announce constitutionally compelled); *State v. Cohrs,* 484 N.W.2d 223, 225 (Iowa 1992) (same)

Kentucky: Ky.Rev.Stat. § 70.078 (Repl.1980) (breaking permitted; derives from *Phillips v. Ronald,* 6 Ky. 244, 96 Am.Dec. 216 (1867))

Louisiana: La.Stat.Ann., C.Cr.P. Arts. 164 & 224 (West 1991) (search warrant and arrest; breaking permitted; origins to 1928)

Michigan: Mich. Comp. Laws Ann. §§ 764.21 (arrest) & 780.656 (West 1979) (search warrant) (breaking permitted); *People v. Polidor,* 190 Mich.App. 673, 476 N.W.2d 482, 484 (1991), *app. denied,* 439 Mich. 918, 479 N.W.2d 636, *cert. denied,* 113 S.Ct. 298 (1992) (knock-and-announce constitutionally compelled)

Minnesota: Minn.Stat. § 629.34 (1989) (arrest)

Mississippi: Miss.Code Ann. §§ 41-29-157(c) (1993) (drug cases; breaking and no knock permitted) & 99-3-11 (1994) (breaking permitted; 1857 origin)

Missouri: V.A.M.S. § 544.200 (1987) (breaking permitted; 1855 origin)

Nebraska: Rev.Stat.Neb. § 29-411 (1989) (breaking permitted; no knock permitted); *State v. Pierson,* 238 Neb. 872, 472 N.W.2d 898, 901 (1991) (apparently holds knock-and-announce constitutionally required)

Nevada: Nev.Rev.Stat. §§ 171.138 (arrest) & 179.055(1) (search warrant; breaking permitted) (Repl.1992)

New Jersey: *See* Appendix D.[2]

New York: N.Y. Crim.Pro.L. §§ 690.50 (search warrant; breaking permitted) & 690.35(3)(b) (no knock permitted) (McKinney 1993)

North Carolina: G.S.N.C. §§ 15A-251 (search warrant; breaking permitted) & 15A-401 (arrest) (1992)

North Dakota: N.D.C.C. §§ 29-29-08 (search warrant; no knock permitted) & 29-06-14 (arrest; breaking permitted) (1991) (origins of both to 1877); *State v. Sakellson,* 379 N.W.2d 779, 783 (N.D.1985) (knock-and-announce constitutionally compelled)

Ohio: Ohio Rev.Code §§ 2935 12 (breaking permitted) & 2933.231(B) (no knock search warrants permitted) (1993)

Oklahoma: 22 Okla.Stat.Ann. §§ 197 (arrest) & 1228 (search warrant; breaking permitted) (1989)

Oregon: Or.Rev.Stat.Ann. § 133.575(2) (1983) (breaking permitted); *State v. Valentine,* 264 Or. 54, 504 P.2d 84, 85 (1972) (knock-and-announce constitutionally compelled); *State v. Gassner,* 6 Or.App. 452, 485 P.2d 822, 824 (1971) (same); *State v. Bost,* 114 Or.App. 519, 837 P.2d 536, 539 (1992), *rev'd on other grounds,* 317 Ore. 538, 857 P.2d 132, 136

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[2] New Jersey generally does not require notice in execution of arrest and search warrants, but it does in searches involving intoxicating liquor.

(1993) (exigency shown)

Pennsylvania: Pa.R.Crim.Pro. 2007 (1994) (breaking permitted); *Commonwealth v. Newman,* 429 Pa. 441, 240 A.2d 795, 599 (1968) (knock-and-announce constitutionally compelled); *Commonwealth v. Chambers,* 385 Pa.Super. 605, 561 A.2d 1257 (1989) (same); *Commonwealth v. Bull,* 426 Pa. Super. 67, 618 A.2d 1019 (1993) (same)

South Dakota: S.D.C.C. §§ 23A-35-8 (search warrant; breaking permitted; origins to 1877) & 23A-35-9 (no knock permitted) (1989)

Tennessee: Tenn.Code Ann. § 40-7-107 (1986) (arrest; breaking permitted; origins to 1858); *Keith v. State,* 542 S.W.2d 839, 841 (Tenn.Cr.App.1976) (knock-and-announce constitutionally compelled)

Texas: Vernon's Tex. Stat. Ann., C.Cr.P. Art. 15.25 (arrest) & 18.06(b) (search warrant; breaking permitted) (1977)

Utah: Utah Code Ann. §§ 77-7-8 (arrest) & 77-23-10 (search warrant; breaking permitted; no knock permitted) (1990)

Washington: R.C.W.A. § 10.31.040 (1992) (arrest; breaking permitted; dates from 1881); *State v. Coyle,* 95 Wash.2d 1, 621 P.2d 1256, 1261-62 (1980) (knock-and-announce constitutionally compelled); *State v. Garcia-Hernandez,* 67 Wash.App. 492, 837 P.2d 624, 627 (1992) (same)

West Virginia: W.Va.C. § 62-1A-5 (Repl.1992) (search warrant; breaking permitted)

Wyoming: Wyo.Stat.Ann. §§ 7-7-104 (search warrant; breaking permitted) & 7-8-104 (arrest; origins to 1876) (1977)

APPENDIX B

State statutes silent on notice but notice required by caselaw

Nine states with statutes silent on the requirement of notice require notice under the common law or the U.S. or their state constitutions by case law:

Connecticut: *State v. Mariano,* 152 Conn. 85, 203 A.2d 305, 310, *cert. denied,* 380 U.S. 943 (1964); *State v. Anonymous,* 30 Conn.Sup. 197, 308 A.2d 251 (1973)

Delaware: *Marvel v. State,* 290 A.2d 641 (Del.1972); *Gregory v. State,* 616 A.2d 1198, 1200 (Del.1992)

Massachusetts: *See, e.g., Commonwealth v. Cundriff,* 382 Mass. 137, 415 N.E.2d 172 (1980), *cert. denied,* 451 U.S. 973 (1981); *Commonwealth v. Sepulveda,* 406 Mass. 180, 546 N.E.2d 879, 880 (1989) (common law rule followed but not constitutionally required)

New Hampshire: *State v. Jones,* 124 N.H. 515, 503 A.2d 802, 804-06 (1985); *State v. Thompson,* 132 N.H. 730, 571 A.2d 266, 268-69 (1990)

New Mexico: *State v. Baca,* 87 N.M. 12, 528 P.2d 656 (App.1974); *State v. Sanchez,* 88 N.M. 402, 540 P.2d 1291, 1292 (1975); *Guitierrez v. State,* 112 N.M. 774, 819 P.2d 1332 (App.1991) (no knock cannot constitutionally be predetermined in search warrant by magistrate); *State v. Williams,* 114 N.M. 485, 840 P.2d 1251, 1253-55 (App.1992)

Rhode Island: *State v. Carufel,* 112 R.I. 664, 413 A.2d 144, 147 (1974)

Wisconsin: *State v. Cleveland,* 114 Wis.2d 213, 338 N.W.2d 500 (App.), *aff'd,* 118 Wis.2d 615, 368 N.W.2d 512 (1983); *State v. Stevens,* 181 Wis.2d 410, 511 N.W.2d 591, 594-95 (1994) (but drug cases

involve exigency per se), *pet. for cert. pending*, 93-9026

Vermont: *Chipman v. Bates*, 15 Vt. 51, 59 (1843) (constitutional question reserved in *State v. Ogden*, 640 A.2d 6, 9 (Vt.1993) (Appendix E))

Virginia: *Johnson v. Commonwealth*, 213 Va. 102, 189 S.E.2d 678 (1972), *cert. denied*, 409 U.S. 1116 (1973); *Grover v. Commonwealth*, 11 Va.App. 143, 145, 396 S.E.2d 863, 864 (1990); *Wynne v. Commonwealth*, __ Va.App. __, 427 S.E.2d 228, 230 (1993).

APPENDIX C-1

Federal statutes requiring notice

U.S. Government: 18 U.S.C. § 3109

District of Columbia: D.C. Code §§ 23-524(b) (breaking permitted) & 33-565 (search warrant for drugs) (1981)

APPENDIX C-2

Statutes of U.S. Territories requiring notice[3]

Puerto Rico: 34 L.P.R.A. § 1819 (1990) (breaking permitted; 1902 origin)

Virgin Islands: 5 V.I.C. §§ 3566(b-c) (arrest) & 3904 (breaking permitted; origin to 1921) (1967)

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[3] The statutes of other territories such as Guam and the Northern Mariana Islands were unavailable in counsel's local law school library.

APPENDIX D
States with no notice requirement

States with no general statutory or caselaw requirement of notice before entry in search cases:

Arkansas: Ark.R.Crim.P. 13.3(e) (1994) (breaking permitted for execution of search warrant; notice not mentioned) (*but see* Ark. Code Ann. § 16-81-107 (1987) (arrest warrant) in Appendix A)

Colorado: Colo.Rev.Stat. § 16-3-304(3)(b) (Repl.1986) (such force as is necessary)

Illinois: 725 I.L.C.S. § 5/108-8 (1993) (force permitted; no knock provision); *People v. Ouellette,* 57 Ill.App. 3d 249, 15 Ill.Dec. 20, 373 N.E.2d 114 (1978), *aff'd,* 78 Ill.2d 511, 36 Ill.Dec. 666, 401 N.E.2d 507 (1979) (lack of announcement is a factor in finding unreasonableness); *People v. Condon,* 195 Ill.2d 815, 142 Ill.Dec. 63, 552 N.E.2d 413 (1990), *aff'd,* 148 Ill.2d 96, 170 Ill.Dec. 271, 592 N.E.2d 951 (1992) (same), *cert. denied,* 113 S.Ct. 1359 (1993)

Kansas: Kan.Stat.Ann. §§ 22-2405(3) (arrest) & 22-2508 (1988) (knock-and-announce rule not adopted in Kansas; *State v. Tyler,* 251 Kan. 616, 634, 840 P.2d 413, 427-28 (1992))

Maryland: *State v. Henson,* 236 Md. 578, 204 A.2d 516 (1964) (unclear what Maryland requires).

New Jersey: N.J.S.A. § 33:1-58 (1994) (notice only required in liquor searches); R.Gov.Crim.Pro. 3:3-3 (arrest) & 3:5-5 (searches) are silent; *see State v. Campisi,* 49 N.J. 238, 229 A.2d 631 (1967) (notice was given, so it was not necessary to determine whether notice required)

APPENDIX E
Constitutional question reserved

States reserving the constitutional question:

Utah: *State v. Thurman,* 846 P.2d 1256, 1262 (Utah 1993)

Vermont: *State v. Ogden,* 640 A.2d 6, 9 (Vt.1993)